In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00432-CV

IN RE FAMILY DOLLAR STORES OF TEXAS, LLC

Original Proceeding

MEMORANDUM OPINION

This mandamus proceeding concerns an order requiring a defendant to create a document or report that does not currently exist. Family Dollar Stores of Texas, LLC ("Family Dollar"), the relator, complains the trial court abused its discretion by ordering Family Dollar to "produce a list of all incidents and lawsuits relating to falling merchandise in the Family Dollar stores located in the county in which I-45 runs and all stores east to the Texas border of the store at issue in this lawsuit[, located in Beaumont, Texas,] for the five (5) years prior to September 11, 2009, [the date of the plaintiff's alleged injury,] within thirty (30) days of the date of this Order." After this Court granted a temporary stay of discovery, the trial court withdrew that order and issued an amended order. The amended order gives Family Dollar sixty days to comply and requires Family

Dollar to "produce a computerized listing (as clearly described in the transcript of hearing on July 8, 2011, [and the affidavit of an employee of Family Dollar, Patricia Ferry, attached to Family Dollar's Objections to Discovery]) of all incidents and lawsuits relating to falling merchandise" in the Family Dollar stores for the same period and geographical description that was required by the trial court's original discovery order.

Mary Jane Walters, the real party in interest, alleges that she was injured when a box of picture frames and other merchandise fell from a shelf at a Family Dollar store in Beaumont. The discovery dispute involved in this matter began after Walters served Family Dollar with a discovery request seeking the production of documents and records of similar incidents relating to falling merchandise in Family Dollar's stores on a nationwide basis. However, while Walters requested "documents" and "records," the trial court's amended order requires that Family Dollar produce a "computerized listing . . . of all incidents and lawsuits[.]" We also note that although Family Dollar's motions and evidence resisting Walters's request to produce address its burden of complying with Walters's proposed discovery, Family Dollar's evidence did not directly address the burden it would be required to incur if it were required to comply with the reduced scope of discovery based on the trial court's discovery orders.

In addition to its complaints concerning the burden of complying with the trial court's discovery orders, Family Dollar also asserts that the trial court's amended order is overly broad. Family Dollar argues that the trial court's amended discovery order

requires it to produce a list which does not currently exist in a tangible form. We note that in attempting to cure Walters's overly broad request for discovery covering a broad geographic area, the trial court also altered the form in which Walters had requested Family Dollar provide her with discovery, by requiring that Family Dollar produce a computerized listing instead of producing reports and documents.[1] *See* Tex. R. Civ. P. 196.4.

With respect to the discovery of electronic or magnetic data, Rule 196.4 of the Texas Rules of Civil Procedure requires a specific request for production of electronic or magnetic data, and the request is required to specify the form in which the data is to be produced. *Id.* Regarding the form of discovery required by the trial court's order, it appears that Family Dollar must create a document in either written or electronic form after searching its computerized data. While trial courts enjoy significant discretion in establishing the scope of discovery, that discretion is not unlimited, as mandamus relief is available when the trial courts compel overly broad discovery. *See Dillard Dep't Stores, Inc. v. Hall*, 909 S.W.2d 491, 492 (Tex. 1995). The Texas Supreme Court, with respect to discovery requests, has specifically stated that a party "cannot be forced to prepare an inventory of the documents for plaintiffs." *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 942 (Tex. 1998).

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[1]Included in Walters's requests is a request that Family Dollar produce a "[p]rintout" of "the computerized report(s) and/or other record(s) generated in the normal course of [Family Dollar's] business[.]"

Walters contends that the trial court's order compelling production of information printed from Family Dollar's databases does not require Family Dollar to create a document that does not currently exist. But nothing in the record before the trial court reflects that Family Dollar maintains computerized lists of incidents involving falling merchandise in the form the trial court's order requires that it be produced. We conclude that requiring a party to reduce raw data from an electronic database to a paper report or to a list in an electronic form requires Family Dollar to make a list that does not currently exist. *See id.* (quoting *McKinney v. Nat'l Union Fire Ins. Co.,* 772 S.W.2d 72, 73 n.2 (Tex. 1989)). Because Rule 196.1 does not allow one party to require that others make lists, the trial court's amended discovery order is broader than the scope of discovery permitted by the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 196.1. Because the order at issue requires Family Dollar to prepare a list inventorying its computerized records for falling merchandise incidents, the order remains overly broad despite the trial court's laudable efforts at correcting Walters's service of requests that contain clearly improper discovery requests.

While our resolution of Family Dollar's complaint that the trial court's discovery order is overly broad resolves the problem of requiring Family Dollar to produce a document that does not exist, it does not solve all of the problems created by Walters's proposed discovery, as discovery should be narrowly tailored to a party's claims by the party that drafts it. In an effort to cure the overly broad scope of Walters's request to

produce, the trial court imposed a geographical limitation that appears unconnected to Family Dollar's corporate structure. In addition to the geographic reach of the trial court's order, the order compels discovery of matters that are not calculated to lead to discovering admissible evidence on Walters's claims. For instance, neither the trial court's order, nor Walters's discovery request, define what the parties and the trial court considered to be "similar incidents." From the hearing, it appears that Walters sought all claims resulting from falling merchandise, whether the claim involved falls off the store's shelves or elsewhere.

"A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information." *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003). Discovery requests must be reasonably tailored to include only matters relevant to the case. *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180 (Tex. 1999). "Although a trial court has broad discretion to schedule and define the scope of discovery, it can abuse its discretion by acting unreasonably." *Id.* at 181. The trial court must balance the burden or expense of the proposed discovery against its likely benefit. Tex. R. Civ. P. 192.4(b). Here, the discovery could have been easily narrowed to require production for a relevant geographic area of claims involving merchandise that fell off shelves of a similar design as the one involved in the incident leading to Walters's injury.

Walters alleges that she was shopping in a Beaumont Family Dollar when boxes of picture frames fell on her from a shelf above her. While the trial court's efforts to restrict the geographic scope was intended to decrease Family Dollar's discovery burden, the trial court's orders failed to narrowly tailor the discovery requests to Walters's claim.

In cases where a trial court opts to triage a party's improper discovery request, the resulting discovery order must narrow the subject matter and the geographical scope of discovery to the subject matter of the claims to allow a party to obtain relevant and necessary information, but at the same time avoid requiring a party to produce tenuous information that is unlikely to lead to the discovery of relevant evidence. *See In re CSX Corp.*, 124 S.W.3d at 153; *In re Union Pac. Res. Co.*, 22 S.W.3d 338, 341 (Tex. 1999); *see also Fethkenher v. Kroger Co.*, 139 S.W.3d 24, 30 (Tex. App.—Fort Worth 2004, no pet.) (holding that in a suit involving an injury from an automatic door hitting a customer, the request for discovery of all previous incidents on door malfunctions in 188 of the defendant's stores was overly broad where the customer "failed to narrow the request in a manner that would heighten its relevancy"). In Walters's case, and although not entirely clear from the trial court's amended order, it appears the trial court expected Family Dollar to create a list of incidents that were coded as having involved falling merchandise without regard to whether the merchandise had fallen from a shelf or elsewhere. We further conclude that the trial court's discovery orders could have been more narrowly tailored by specifically defining the meaning of the term "similar incident" and that it

could have been tailored to a more reasonable geographic area. A more focused request, had one been served to begin with, would have more easily allowed the courts to address any resulting dispute over the relevance of the discovery to be produced, as well as make the record clear that the discovery is calculated to lead to evidence relevant to the party's claim. Because Walters's request could have been more narrowly tailored to heighten relevance, and because the trial court's order, although narrower than Walters's request, still requires Family Dollar to produce tenuous information as related to Walters's claim, the trial court's discovery order is overly broad and not narrowly tailored to comply with the discovery rules.

Last, we address the appropriate remedy for the overly broad order compelling discovery. The burden to propound discovery complying with the rules of procedure is placed on the party propounding the discovery. *See In re TIG Ins. Co.,* 172 S.W.3d 160, 168 (Tex. App.—Beaumont 2005, orig. proceeding). On objection by the responding party, that burden should not be transferred to the courts to redraft a party's clearly overly broad discovery. *Id.* In other cases, we have noted that additional problems can be created by a court's efforts at performing "'battlefield surgery'" on a party's overly broad discovery requests. *See id.*; *see also In re Sears, Roebuck and Co.*, 123 S.W.3d 573, 578 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). Although we could remand the matter to the trial court and request that the trial court make another effort to narrow Walters's requests, we again decline to transfer the burden of drafting proper requests to

the courts. Under these circumstances, we conclude that the better practice is to require the parties to draft proper requests; therefore, we direct the trial court to withdraw its orders compelling production of lists. *See* Tex. R. App. P. 52.8(c). Should Walters desire to pursue further discovery about other similar incidents at other locations where Family Dollar conducts its business, we are confident that her requests will be narrowly tailored to the subject matter of her claims.

We conditionally grant the petition for writ of mandamus, and we direct the trial judge to vacate its discovery orders compelling Family Dollar to produce a list of previous incidents and suits related to falling merchandise. We are confident the trial court will vacate its orders to compel production of the lists at issue in this case, and that Walters, should she seek to obtain further discovery, will serve narrowly tailored discovery that complies with the Texas Rules of Civil Procedure. The writ will issue only if the trial court fails to take appropriate action in accordance with this opinion.

PETITION CONDITIONALLY GRANTED.

PER CURIAM

Submitted on September 19, 2011
Opinion Delivered November 3, 2011
Before McKeithen, C.J., Gaultney and Horton, JJ.